Supreme Court, U.S.
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NO.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UTICA MUTUAL INSURANCE COMPANY,
Petitioner,
vs.
EUGENE TALLEY, JUANITA MURPHY
and the
JACKSON COUNTY BANK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THIS PETITION SHOULD BE GRANTED AS IT RAISES THE IDENTICAL ISSUES RAISED IN *Burlington Northern Railroad Company v. Woods*, 768 F.2d 1287 (11th Cir. 1985) *cert. granted*, 54 U.S.L.W. 3630 (U.S. March 24, 1985) (No. 85-1088), WHICH THIS COURT HAS ALREADY AGREED TO HEAR.

II. WHETHER SECTION 12-22-72 OF THE *Code of Alabama* (1975) WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT.

III. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE WHICH CANNOT BE APPLIED TO FEDERAL ACTIONS.

PARTIES TO THE PROCEEDING

Parties:

Utica Mutual Insurance Company
Eugene Talley
Juanita Murphy
The Jackson County Bank

Affiliated Or Related Parties:

Utica National Insurance Group
Graphic Arts Mutual Insurance Company
Utica National Insurance Company of Delaware
Republic Franklin Insurance Company of Columbus, Ohio
Utica National Life Insurance Company
Utica National Insurance Company of Texas
Utica Lloyd's of Texas
Uni-Service Life Agency, Inc.
Uni-Service Leasing Service, Inc.
Uni-Service Operations Corporation
Uni-Service Risk Management Corporation
Uni-Service Excess Facilities Corporation

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A — Order dated February 26, 1986 by the Eleventh Circuit Court of Appeals affirming the decision of the United States District Court for the Northern District of Alabama.

B — Order dated October 7, 1986 granting appellee's motion for penalty pursuant to Alabama statute.

C — Order dated November 14, 1986 denying Appellant's petition for Rehearing.

TABLE OF AUTHORITIES

Cases:

Affholder Inc. v. Southern Rock, Inc. 746 F.2d 305 (5th Cir. (1984) 11

Burlington Northern Railroad Company v. Woods, 768 F.2d 1287 (11th Cir. 1985) *cert. granted*, 54 U.S.L.W. 3630 (U.S. March 24, 1985) (No. 85-1088) ii,7,8

Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) 10

Lindsey v. Normet, 405 U.S. 56 (1972) 8

Matthews v. Elridge, 424 U.S. 319 (1976) 9

Proctor v. Gissendaner, 587 F.2d 182 (5th Cir. 1974) 11

Thompson v. Louisville, 362 U.S. 199 (1900) 10

Constitutional Provisions and Statutes:

U.S. Const. Amend. XIV 2

28 U.S.C § 1254(1) 2

28 U.S.C § 2101(c) 2

28 U.S.C § 1961 3,10

Ala. Code § 8-8-10 (1975) 4,8

Ala. Code § 12-22-72 (1975) ii,4,6,7

Fed. R. App. P. 8 5,10

Fed. R. App. P. 37 10

Fed. R. App. P. 38 5,10

Ala. R. App. P. 38 6,8

Treatises and Other Authority:

Comment, Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama — Constitutional and Policy Considerations, 32 Ala. L. Rev. (1980) 9

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the United States Court of Appeals, Eleventh Circuit granting appellees' motion for ten percent penalty pursuant to Alabama statute is attached as Appendix "B". The order of the Eleventh Circuit denying Petitioner's motion for reconsideration is attached as Appendix "C". This issue was raised for the first time after Petitioner's Appeal was unsuccessful, and could not have been raised at the trial court level.

JURISDICTION

The order of the United States Court of Appeals, granting the ten percent statutory affirmance penalty was entered on October 7, 1986. A petition for rehearing, treated by the Eleventh Circuit as a motion for reconsideration, was timely filed with the Eleventh Circuit Court by petitioner. This petition for rehearing was denied on November 14, 1986 (Appendix "C"). Pursuant to 28 U.S.C. § 2101(c), petitioner has ninety days to file its Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The first substantive question presented involves the constitutionality of a statutory affirmance penalty imposed on defendant/appellants who file unsuccessful appeals in Alabama. The second question concerns the applicability of the statutory penalty to diversity actions brought in Federal court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, Section 1.

* * * * *

Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States courts shall distribute notice of that rate and any changes in it to all Federal judges.

28 U.S.C. § 1961(a)

* * * * *

Affirmation of stayed judgment — generally.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the

judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 per cent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

Section 12-22-72, *Code of Alabama* (1975).

* * * * *

Interest on money judgments and costs.

Judgments for the payment of money, other than costs, if based upon a contract action, bear interest from the day of the cause of action, at the same rate of interest as stated in said contract; all other judgments shall bear interest at the rate of 12 percent per annum, the provisions of Section 8-8-1 to the contrary notwithstanding, provided, that fees allowed as trustee, executor, administrator or attorney and taxed as a part of the cost of the proceeding shall bear interest at a like rate from the day of entry.

Section 8-8-10, *Code of Alabama* 1975.

* * * * *

Stay or Injunction Pending Appeal

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. . . .

(b) *Stay May be Conditioned Upon Giving of Bond; Proceedings Against Sureties.* Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court.

Federal Rules of Applellate Procedure, Rule 8.

* * * * *

Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Federal Rules of Appellate Procedure, Rule 38.

* * * * *

Damages for Frivolous Appeal.

In civil cases, if the appellate court shall determine on motion or *ex mero motu* that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Alabama Rules of Appellate Procedure, Rule 38.

STATEMENT OF THE CASE

The respondents, Eugene Talley, Juanita Murphy and the Jackson County Bank, brought suit against the petitioner in the Circuit Court for Jackson County, Alabama on March 14, 1984. The suit sought to enforce a policy of fire insurance, sold to the respondents by the petitioner, for damages caused by a fire at the respondents' house.

The petitioner removed this action to the United States District Court for the Northern District of Alabama on April 13, 1984 and answered the respondents' complaint by asserting that the insured property was intentionally burned by the respondents.

The matter proceeded to jury trial before the Honorable Seybourn H. Lynne on April 1, 1985. On April 10, 1985, Judge Lynne, based upon a jury verdict, entered judgment against the petitioner for $57,425.00, together with interest at six percent from the date of the fire, October 14, 1983. Notice of appeal was filed on July 22, 1985. Respondents cross-appealed. After submission of briefs, the Eleventh Circuit Court of Appeals affirmed the judgment on February 26, 1986.

On March 6, 1986, respondents filed a motion for assessment of penalty pursuant to Section 12-22-72 of the *Code of Alabama* (1975). As allowed in that statute, this motion sought the ten percent penalty that could be levied under Alabama law against unsuccessful defendant/appellants on a money judgment. On March 14, 1986, petitioner responded to the motion for assessment of penalty. On October 7, 1986, the Eleventh Circuit granted the motion for the assessment of the penalty.

Petitioners timely filed a petition for rehearing. In the petition for rehearing, petitioner brought to the Eleventh Circuit's attention that this Court had accepted for review the case of *Burlington Northern Railroad Company v. Woods,* 748 F.2d. 1287 (11th Cir. 1985) *cert. granted* 54 U.S.L.W. 3630 (U.S. March 24, 1985) (No. 85-1088). The *Burlington* case raised the identical issues as to the validity of Alabama's appeal penalty. On November 14, 1986, the petition for rehearing was denied.

Petitioner now prays that this Court accept this case in conjunction with the *Burlington Northern Railroad Company v. Woods, supra,* case which is currently before this Court on review. The issues are identical and the disposition of that case will govern the proper disposition of Petitioner's case.

REASONS FOR GRANTING THE WRIT

1. The exact issues are currently before this Court.

There is an identity of issues between this case and the *Burlington Northern Railroad Company v. Woods, supra,* case, already accepted and argued before this Court. Both cases seek to have Section 12-22-72 of the *Code of Alabama* (1975) declared unconstitutional. Both cases stem from motions following an unsuccessful appeal by the petitioner in which the ten percent penalty was assessed. There are no other issues other than the propriety of this penalty in either the *Burlington Northern* case or in this case. As such, the consideration of these cases should be joined or this case should be disposed of in a manner consistent with this Court's ultimate ruling on the *Burlington Northern* case.

2. The statutory affirmance penalty violates the equal protection clause.

Any rule which limits access to an appellate court, such as the Alabama appeal penalty, must be "reasonably tailored to achieve" those ends and "uniformly and nondiscriminatorily applied." *Lindsey v. Normet,* 405 U.S. 56, 78 (1972). The Alabama statute manifestly fails this test.

First, the Alabama affirmance penalty is not reasonably tailored to serve as a deterrent to frivolous appeals. It provides no penalty against plaintiffs or losing parties in litigation involving non-monetary awards who file unsubstantial appeals. On the other hand, the statute mandates an assessment against all losing defendant/appellants regardless of the substantiality or good faith of their appeals. Further, the Alabama rules of appellate procedure authorize the appellate court to assess damages for frivolous appeals. Alabama Rule of Appellate Procedure, Rule 38.

Second, the appeal penalty adds no protection to a plaintiff's litigated property. The required supersedeas bond guarantees recovery of the judgment interest and appellate costs before a judgment may be stayed pending appeal. Moreover, the twelve percent interest per annum from the date of entry to the date it is ultimately paid guarantees reimbursement for the time cost of the delay. *Code of Alabama,* Section 8-8-10 (1975). The statutory penalty is just as it is described — a penalty. Further, it is a penalty that unconstitutionally limits access to an appellate court.

3. The statute deprives a defendant of property without due process of law.

The Alabama affirmance penalty also violates the Due Process Clause. Imposition of the affirmance penalty is mandatory. There is no provision for an opportunity to rebut the statutory presumptions.

When property is taken by government action, due process requires a balancing of three factors. First, the private interest that will be affected. Second, the risk of erroneous deprivation of that interest under the procedural design of the statute. Third, the interest of the government including the legislative objective and the burden that an alternative procedure would entail. *Mathews v. Eldridge,* 424 U.S. 319, 355 (1976); Comment, *Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama — Constitutional and Policy Considerations,* 32 *Ala. L. Rev.* 197, 217 (1980).

This statute affects a substantial private interest. Petitioner in this case stands to incur an additional ten percent in damages, in addition to the judgment and post-judgment interest due to the affirmance penalty. Further, every defendant filing an appeal in Alabama must first weigh the possibility of incurring this additional ten percent penalty before deciding whether to appeal.

The error in the statutory design is inherent. The statute necessarily entertains erroneous and irrebuttable presumptions. The statute presumes that all appellants who lose an appeal bring unmeritorious appeals. Second, the statute presumes that an appeal from a larger verdict is more frivolous than a small one. (This is so because ten percent of a larger verdict is more of a

penalty than ten percent of a smaller verdict). Common experience suggests that indeed the reverse is true.

This Court has looked with disfavor on irrebuttable presumptions arising out of state statutes. See, e.g., *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). In that case, the Court held that any such irrebuttable presumption is forbidden "when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." *Id.* at 645.

Finally, when penalties are enforced by a state, due process requires that there be some rational relationship between the penalty and the action sought to be deterred by the penalty. The only possible state interest in enforcing this penalty would be to deter frivolous appeals. There must be some evidence, however, that an appeal is in fact frivolous before a penalty for filing a frivolous appeal can be assessed. *Cf. Thompson v. Louisville*, 362 U.S. 199 (1960). This penalty is automatic. It thus cannot achieve this state purpose.

4. The affirmance penalty should not be applied by federal courts.

The Federal Rules of Appellate Procedure completely pre-empt the disposition of appeals in the United States Court of Appeals. The Federal Rules of Appellate Procedure permit the court to stay execution of judgments and to require a supersedeas bond during such stay. Fed. R. App. P. 8. Interest accrues on judgments from the date of entry. 28 U.S.C. § 1961 and Fed. R. App. P. 37. The Court of Appeals is permitted to assess damages when an appeal is frivolous. Fed. R. App. P. 38.

This Court has ordered that these appellate rules "shall govern all proceedings in appeals . . . thereafter brought . . . " Order of the United States Supreme Court, December 4, 1967. Consequently, it is federal law which governs the procedure for appeals brought in federal court.

There is, in fact, a conflict in the circuits as to this point. In *Affholder Inc. v. Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984), the Fifth Circuit found a Mississippi appeal penalty to be pre-empted by the Federal Rules. In *Proctor v. Gissendaner*, 587 F.2d 182 (5th Cir. 1979), the old Fifth Circuit enforced the Alabama appeal penalty at issue today. This Court should resolve this conflict and hold the Alabama appeal penalty pre-empted by federal law.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7496
Non-Argument Calendar

D. C. Docket No. 84-5255

EUGENE TALLEY, JUANITA MURPHY
and THE JACKSON COUNTY BANK,
a Corporation,

Plaintiffs-Appellees,
Cross-Appellants,

versus

UTICA MUTUAL INSURANCE COMPANY,
a Corporation,

Defendant-Appellant.
Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(February 26, 1986)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

It is further ordered that each party bear own costs.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7496

EUGENE TALLEY, JUANITA MURPHY
and THE JACKSON COUNTY BANK,
a Corporation,

Plaintiffs-Appellees,
Cross-Appellants,

versus

UTICA MUTUAL INSURANCE COMPANY,
a Corporation,

Defendant-Appellant,
Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The motion of plaintiffs-appellees for the assessment of a penalty of $6,255.00 against the defendant-appellant and the surety on its supersedeas bond is granted.

Filed: October 7, 1986

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7496

EUGENE TALLEY, JUANITA MURPHY
and THE JACKSON COUNTY BANK,
a Corporation,

Plaintiffs-Appellees,
Cross-Appellants,

versus

UTICA MUTUAL INSURANCE CO.,
a Corporation,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

Appellent's petition for rehearing, treated as a motion for reconsideration of the order of October 7, 1986, is denied.

Filed: November 14, 1986